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No. 86-1898

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM DUNCAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS SUPREME COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the reversal of respondent's conviction and life sentence by the Illinois Supreme Court, expressly predicated on an Illinois severance rule that substantially predates Bruton v. United States, 391 U.S. 123 (1968), was based on adequate and independent state grounds so that this Court lacks jurisdiction to review this case?

2. Whether the decision issued below by the Illinois Supreme Court reversing repondent's conviction and remanding for a new trial is in conflict with this Court's decision in Richardson v. Marsh, 481 U.S.___, 95 L.Ed.2d 176 (1987) and, if so, whether the conflict is an adequate basis for a grant of certiorari at this time given the limited precedential importance of this case.

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OPINION BELOW

The opinion of the Illinois Supreme Court, reported as People v. Duncan, 115 Ill.2d 429, 505 N.E.2d 307 (1987) is attached to the petition as Appendix A, App. 1-13.

JURISDICTION

Petitioner asserts this Court has jurisdiction pursuant to 28 U.S.C. sec. 1257(3). Respondent maintains that this Court lacks jurisdiction because the decision of the Illinios Supreme Court was based on adequate and independent state grounds and is not otherwise properly reviewable by this Court.

STATEMENT OF THE CASE

The procedural history and statement of facts is set forth in the opinion of the Illinois Supreme Court below. Respondent adds the following:

The vast majority of the testimony and evidence offered by the State related only to codefendant Perry Olinger. The indictment below charged, and the State maintained, that it was Olinger who did the actual killings. With respect to the

deaths of Gordon Stevens and Debbie Bushman, there was no evidence and the State made no contention that respondent was present or in any way actually participated in those murders.

James Adams was respondent's close friend of many years. Adams' fiancee, Tina Tabor testified at trial that the two men were good friends and never had cross words. Respondent was asleep in Adams' house when Adams' body was discovered in a nearby room. Despite inferences pressed by the State from his presence nearby, respondent was not shown to have participated in this murder in any way.

Respondent testified that he had taken a strong sedative at 6:00 a.m. the morning of James Adams' murder. A voluntary blood test made the same day was consistant with this testimony. Within 30 minutes, the sedative took effect and he entered a heavily sedated sleep. He

remained asleep until some hours later when Tina Tabor awakened him. Tabor testfied that she had discovered Adams' body at 10:15 a.m., his throat slashed, skull crushed and with blood splattered around the room. She found respondent asleep in an adjacent room. With some difficulty, she was able to awaken him. He wore the same clothes he had on the night before. There was no blood on him nor in the room where he had been sleeping.(1) He had no cash or cocaine in his possession.

From the start, respondent was shocked by the death of his friend and cooperated fully with the police

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(1) The Illinois Supreme Court, in affirming the death sentence of respondent's co-defendant Perry Olinger noted that, "the lack of blood on Duncan who was found sleeping in the same clothes he had been wearing before the murder, warrants the inference that defendant [Olinger], and not Duncan, actually committed the fatal stabbing." People v. Olinger, 112 Ill.2d 324, 439 N.E.2d 579 (1986).

investigation of the murder. When he learned of Adams' death, he immediately helped summon the police and, standing on the front porch crying, he and Tabor awaited their arrival. He cooperated with them fully, took a police polygraph and underwent hypnosis, and never in word or deed directly or indirectly evidenced knowledge of how the murder had occured. In an effort to help police find out who was involved in the murder, respondent agreed to wear a police body microphone and surreptitously record conversations with known drug dealers in the area, including codefendant Olinger. He continued his cooperation during the months before his indictment and arrest, five months after the killings took place. The police lieutenant who worked with him testified on his behalf at sentencing.

Prior to this case, respondent had no criminal record. He was honorably

discharged from the U.S. Army and character witnesses vouched for his good reputation and non-violence.

POINT ONE

THE DECISION OF THE ILLINOIS SUPREME COURT WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND THIS COURT THEREFORE LACKS JURISDICTION

The Illinois Supreme Court based its reversal of respondent's conviction upon a lack of "fundamental fairness" requiring severance and a new trial under Illinois law. People v. Duncan, App. 13. The governing principles of Illinois law requiring severance are distinct and independent, and are separate from a defendant's rights under the Confrontation Clause of the United States Constitution. As such they represent adequate and independent state grounds for the reversal, thus denying this Court

jurisdiction in this case. Michigan v. Long, 463 U.S. 1032, 77 L.Ed.2d 1201 (1983); Abie State Bank v. Bryan, 282 U.S. 765, 773, 75 L.Ed.2d 690 (1931).

In analyzing the prejudice to respondent flowing from the statements of his codefendant Olinger, the Illinois Supreme Court assessed the statements in the context of the state's other evidence against respondent. Petitioner argues that in light of this Court's decision in Richardson v. Marsh, 481 U.S.___, 95 L.Ed.2d 176 (1987), this approach in the Illinois Supreme Court's decision amounts to "an unwarranted extension of the Bruton doctrine and must be corrected." Petition at 7.

Contrary to petitioner's assertion, in applying the linkage or contextual approach, the Illinois Supreme Court was following Illinois caselaw, far antedating the Bruton opinion, that has consistently

held that a condefendant's statement does not have to directly inculpate defendant and, "it is enough if incriminating implications clearly point to the defendant's guilt. (People v. Seritello, (1944), 385 Ill. 554, 558; People v. Mcvay (1981), 98 Ill. App.3d 708, 716)." App. 12 Citing further Illinois case precedent as authority, the Court below continued, "(i)n evaluating incriminating implications, it is proper to consider the statement in light of the State's other evidence against the defendant. People v. Ross (1963), 41 Ill.2d 445, 462; People v. Clark (1959), 17 Ill.2d 486, 491-92." Id. This line of authority rests on a defendant's right to a fair trial, not his right to confrontation, and applies equally whether the codefendant testifies or not.

In People v. Mcvay, 98 Ill. App.3d 708, 424 N.E.2d 922 (3rd Dist. 1981),

cited affirmatively by the Court below, the unique independence of the state ground for evaluating severance issues of this kind was explicitly emphasized.

> While the severance rule established and stated in Bruton v. United States (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, rested on a defendant's right to cross-examination as secured by the confrontation clause, the Illinois rule requiring severance in such situations far antedates Bruton and is premised upon fundamental principles of justice and the defendant's right to a fair trial and not merely upon a violation of the right to confront adverse witnesses. (People v. Sweetin (1927), 325 Ill. 245, 252, 156 N.E. 354; People v. Serritello (1944), 385 Ill. 554, 558, 53 N.E.2d 581.)

Id. at ____, 424 N.E.2d at 928.

The Mcvay court went out of its way to eliminate any doubt that the fair trial right requiring severance was totally independent of any violation of the right to confrontation. "Even with the ability to cross-examine, the prejudice to a

defendant from the incriminating admission by a co-defendant remains, and a severance should be granted." Id. Thus the independence of the state grounds is readily "apparent from the four corners of the opinion." Michigan v. Long, 463 U.S. at 1040, 77 L.Ed.2d at 1204.

This is not a situation where the Illinois Supreme Court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568, 53 L.Ed.2d 965 (1979). Illinois has historically taken an independent, state based approach to the analysis of severance issues in general, and the adoption of the contextual method for review of the prejudice in codefendant statements is but one example of this independence.

This Court has long recognized that "where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." Fox Film Corp. v. Muller, 296 U.S. 207, 210, 80 L.Ed. 158 (1935). The decision below, grounded in both federal constitutional guarentees and independent Illinois state law guarantees, should not now be affected by an apparent adjustment to the federal precedent cited by the state court. "This is not a case in which an American citizen has been deprived of a right secured by the United States Constitution or a federal statute, . . . a state court has upheld a citizen's assertion of a right, finding the citizen to be protected under both federal and state law." California v. Carey, 471 U.S.

386, 85 L.Ed.2d 406 (1985) (Stevens, J. dissenting), quoting Michigan v. Long, 463 U.S. at 1067-1068, 77 L.Ed.2d at 1232 (Stevens, J. dissenting).(2)

Because the decision below rests on both federal law, and adequate and independent Illinois law, this Court lacks jurisdiction to review the action of the Illinois Supreme Court in this case.

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(2) Respondent is aware that this Court recently granted certiorari and remanded three cases for reconsideration in light of Cruz v. New York, 481 U.S. ___, 95 L.Ed.2d 162 (1987). See, 55 U.S.L.W. 3729-30. The contrasts between Cruz and Marsh highlight Justice Stevens comments. In Cruz, the companion case to Marsh, this Court reversed a defendant's conviction holding that the admission of a codefendant's confession violated the Confrontation Clause even though it was corroborated by defendant's own "interlocking" confession. Thus in Cruz, unlike in Marsh, this Court redressed a State's violation of an individual's constitutional rights. In contrast, Marsh is an expression that a constitutional right has been improperly extended and clarifies an interpretive conflict in the federal courts. Once clarification has been made, the need for review in similar cases has been eliminated.

POINT TWO

THE DECISION RENDERED BELOW BY THE ILLINOIS SUPREME COURT IS CLEARLY DISTINGUISHABLE FROM THIS COURT'S OPINION IN RICHARDSON V. MARSH AND ANY APPARENT CONFLICT IS NOT AN ADEQUATE BASIS FOR A GRANT OF CERTIORARI AT THIS TIME

Richardson v. Marsh is distinguishable from the case at bar. Procedurally, the two cases are significantly different. Marsh came to this Court upon the reversal by the United States Court of Appeals for the Sixth Circuit of a Michigan State Court conviction. Thus, by its decision in Marsh, this Court reinstated a state trial court judgment, affirmed by the Michigan Court of Appeals with leave to appeal denied by the Michigan Supreme Court. In reversing the Sixth Circuit, this Court was exercising its supervisory function over the federal judiciary.

"As the Court of last resort in the

federal system [this court] . . . must occasionally perform a pure error correcting function in federal litigation. We do not have comparable supervisory responsibility to correct mistakes that are bound to occur in the thousands of state tribunals throughout the land." Florida v. Rodriquez, 469 U.S. 1,7, 83 L.Ed.2d 165 (1984) (Marshall, J. dissenting). As has been reiterated by both members of this Court and other commentators, the general function of the Supreme Court is not the correction of perceived errors in lower court decisions. See e.g., Estreicher & Sexton, New York University Supreme Court Project, A Managerial Theory of the Supreme Court's Responsibilities, 59 N.Y.U.L.Rev. 677, 761 (1984); See also, Brennan, Some Thoughts on the Supreme Court's Workload, 66 Judicature 230, 231 (1983); Stevens, Some Thoughts on Judicial Restraint, 66

Judicature 173, 181 (1982). As this Court's own rules point out, "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." Sup.Ct.R. 17 (emphasis added). Reasons of this type are nowhere present in this case.

Even if one assumes arguendo that the Illinois Supreme Court incorrectly construed Bruton in this case, which respondent denies, no significant detriment would flow from this error sufficient to merit the exercise of this Court's certiorari jurisdiction. If the decision of the Illinois Supreme Court stands, William Duncan will have a new trial and either his guilt will be established beyond a reasonable doubt or he will be acquitted. The future application of Richardson v. Marsh in

confrontation rights cases will in no way be impeded or compromised. Thus this case stands alone, presenting an isolated and unique situation which will not repeat and which therefore does not merit review by this Court.

Petitioner asserts that "acceptance of the Illinois Court's decision would place impossible burdens on trial court judges who are faced with pre-trial severance motions based on Bruton." Petition at 7. This statement ignores the fact, as noted in Point One, supra, that Illinois' "contextual linkage" approach in weighing whether prejudice warrants severance considerably antedates Bruton and has been successfully applied in Illinois without any such burdens arising. Furthermore, presented merely as a question of judicial administration, the burden such a rule may place on the trial courts of Illinois is an issue for the

Illinois Supreme Court to examine, and not within the supervisory jurisdiction of this Court.

Factually, the Marsh case is also distinguishable from the case at bar. The holding in Marsh was precisely stated: "We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to her existance." Id. 481 U.S. at ___, 95 L.Ed.2d at 188. In Marsh it was only through the defendant's own testimony that a linkage to the objectionable statements was established. 481 U.S. at ___, 95 L.Ed.2d at 184. Significantly, in a footnote, limitations of the Marsh holding were further emphasized by the clarification that no opinion was expressed as to the admissibility of a confession when the

defendant's name had been replaced by a symbol or pronoun. Id., f.n. 5.

In contrast, in the present case, one of the objectionable statements clearly identifies respondent by his first name. App. at 4. Further in contrast to Marsh, respondent Duncan, testifying on his own behalf, was forced to emphatically deny the evidentiary implications of those statements, a burden he would not have faced except for their prejudicial admission. App. 7-8. The prosecution's argument for defendant's involvement in the murders rested primarily on the nontestifying condefendant's out of court statements. App. 11-12.

In addition to differences between this case and Marsh, there are other reasons why Marsh should not be applied. This Court has recognized that in criminal litigation concerning constitutional claims "the interests of justice" and "the

exigencies of the situation" my argue in favor of limiting a new rule's retroactive effect. Applying these principles to the case at bar, it is clear that in the interests of justice the Marsh rule should not be applied to this case. This is particularly true in light of the paucity of evidence linking respondent to the crimes charged. Respondent contested the constitutionality of his conviction in that his guilt was not proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). The Illinois Supreme Court, while recognizing that there was absolutely no direct evidence linking William Duncan to the crimes charged, rejected this argument without elaboration. App. 12, 13. By allowing the decision below to stand, William Duncan will not be freed, but will be forced to stand trial again, this time on his own. The State of Illinois will be

required to prove his guilt beyond a reasonable doubt, a task they have thus far failed to accomplish.

Petitioner asks this Court to reinstate William Duncan's conviction and deny him the new trial ordered by the Illinois Supreme Court. This action is not in the interests of justice and should not be ordered.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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